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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 487

TED VERNON HEAD,
Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and Brief in Support Thereof.

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TED VERNON HEAD,
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vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Supreme Court of the United States:

The Petitioner, Ted Vernon Head, presents this Petition for Writ of Certiorari and respectfully shows unto the Court as follows:

1. Summary of Matters Involved.

On April 1, 1952, in the United States District Court in and for the Western District of Oklahoma appellant was convicted by a jury of failing to submit to induction into the armed forces of the United States [R. 3]; he was sentenced on the same day to 3 years imprisonment [R. 4]; the indictment was under the

Universal Military Training and Service Act, as amended[1] [R. 1-2].

Appellant is a conscientious objector and is a member of the pacifist division of the Church of Christ denomination.[2] He asserted a claim to the Selective Service System for a classification designated at that time as IV-E[3] (subsequently designated I-O and presented his evidence but was given an I-A-O classification by his local board; this action was confirmed by the Appeal Board.

Appellant's fundamental contention is that the Local Board of the Selective Service System, by classifying him in Class I-A-O, found him to be a sincere conscientious objector and that there was no evidence before it on which to base the finding that his religious scruples with respect to participation in military activity were only to participation in killing; therefore, the order to report for induction was illegal being based on a classification unsupported by any evidence.

During the trial appellant attempted but was forbidden to show he was not given the claimed IV-E classification because the then existing regulation did not provide any duty or work obligation for the registrants so classified [R. 63]. The Court of Appeals did not pass on this claimed error. The Selective Service

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[1]U. S. C., Title 50 App., Sec. 462.

[2]This "division" is 200 congregations strong and has more than a 100-year history of being a "peace" Church of Christ: Attorney General File No. A. G. 000.31 and Congressional Record, May 7, 1952.

[3]See Appendix "A" for the Selective Service System Regulations on this and the other SSS classifications mentioned herein.

System file and the testimony of the three local board members showed that there was no basis for giving appellant an I-A-O instead of the claimed IV-E classification [R. 75, 76, 80, 83, 100]. During the argument in the Court of Appeals appellant challenged appellee to show any basis of fact for the I-A-O classification. All attempts by counsel for appellee to meet this challenge were met by the court's statement:

> "That goes to the credibility of appellant and his credibility was decided in his favor by the Selective Service System and their decision on factual matters is final."

Nevertheless, the opinion of the Court of Appeals presented, for the first time, a "basis of fact" to support the classification. The "basis of fact" used by the Court of Appeals was the application of a hearsay fragment given to the Hearing Officer by the F.B.I. This fragment was never before the Local Board; also it is false, as will be argued later, herein.

Appellant also complains of his trial in the District Court with respect to its biased atmosphere and to the instructions given the jury. These points, and their disposition by the Court of Appeals will be particularized hereinafter.

2. Opinion of Court Below.

The opinion of the United States Court of Appeals is not yet reported in the *Federal Reporter*, but it appears in the record certified.

3. Statutory Provision Sustaining Jurisdiction.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U. S. C.

4. Timeliness of the Petition.

The judgment of the Court of Appeals was entered on October 8, 1952. An order was obtained from the Court of Appeals extending until December 7, 1952 the time for filing a petition for a writ of certiorari. The petition for writ of certiorari is filed within the required time.

5. Questions Presented:

I. Is a defendant prejudiced by inconsistent instructions, on a crucial point, the erroneous one being sweeping and given last?

II. Is a defendant prejudiced by a closing jury argument of the U. S. Attorney that is so improper the Court of Appeals itself sees fit to condemn it?

III. Is a defendant to be precluded from presenting evidence that he was classified in Class I-A-O for illegal reasons, or to be precluded from presenting evidence that the local board classified him in Class I-A-O without a basis of fact?

IV. May a Court of Appeals support its opinion that there is a basis of fact for a classification by a construction based on an alleged fact not known to the local board and never

asserted by the United States Attorney at any time?

V. May hearsay be the sole basis for either a selective service classification, or a District Court conviction, or, as in this instance an affirmance by a Court of Appeals?

VI. May appellant, *de hors* the record, now show the complete falsity of the above-referred-to hearsay by affidavits (hereto annexed as Appendix B)?

VII. Assuming the truth of the hearsay is appellant bound by every view of his spiritual teacher?

6. Reasons Relied on for the Allowance of the Writ.

The decision of the Court of Appeals below raises questions of national and general importance:

(1) in connection with inconsistent jury instructions;

(2) in connection with misbehavior of a prosecuting attorney,

(3) in connection with admission of pertinent evidence;

(4) connected with the use of hearsay in the administration of the Universal Military Training and Service Act;

(5) in connection with use of hearsay by Courts of Appeal;

(6) should an appellant be permitted an opportunity to show the falsity of a fact never used

during his trial, nor during oral argument in the Court of Appeals but first used in the Opinion of the Court of Appeals?

(7) are the religious beliefs of an individual to be inferred from ones reputedly held by his teacher, particularly when the individual himself asserts a different belief?

WHEREFORE, your Petitioner prays that this Court issue a writ of certiorari to the Court of Appeals for the Tenth Circuit; and that thereupon the judgment of said Court of Appeals be set aside, and that the District Court below be directed to order the cause dismissed or to grant Petitioner a new trial.

TED VERNON HEAD
Petitioner,

By J. B. Tietz
Counsel for Petitioner.

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TED VERNON HEAD,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. Preliminary Statement.

For a statement showing the opinion of the Court of Appeals below, the basis on which the jurisdiction of this Court is claimed, the questions presented, and a statement of the case, reference is here made to the foregoing Petition for Writ of Certiorari.

2. Specification of Errors.

The judgment of the Court of Appeals below is contrary to law in that

I. The jury was incorrectly instructed;
II. The jury argument of plaintiff was prejudicial;
III. Evidence of defendant was erroneously refused;

IV. There was no basis of fact for the classification.

3. Summary of Argument.

I. A defendant is prejudiced by inconsistent instructions on a crucial point, particularly when the erroneous portion is sweeping and is given last.

II. A defendant is prejudiced by a closing jury argument of the United States Attorney that is so improper the Court of Appeals itself sees fit to condemn it.

III. A defendant may not be precluded by the trial court from presenting evidence that he was classified in Class I-A-O for illegal reasons nor may he be precluded from presenting evidence that he was classified in Class I-A-O without any basis of fact.

IV. A defendant is prejudiced when the Court of Appeals (attempting to cure the failure of the trial court in not making a necessary finding) finds that there was a basis of fact for the I-A-O Classification and supports its finding by a line of reasoning that is self-contradictory.

V. The Court of Appeals may not use hearsay to support its opinion that a basis of fact existed for the classification, nor could the Selective Service System have done so.

VI. The hearsay evidence upon which the Court of Appeals predicated its decision was untrue; the appellant never before having faced the necessity of showing the truth on the point involved should have an opportunity to do so.

VII. A selective service registrant, professing to be a conscientious objector to all participation in warfare, is not bound by all the views on the subject held by his spiritual teacher, even granting that their views actually differ.

4. Argument.

I.

A Defendant Is Prejudiced by Inconsistent Instructions on a Crucial Point, Particularly When the Erroneous Portion Is Sweeping and Given Last.

Appellant's defense centered around the fact that he had been illegally classified I-A-O.

An important portion of this defense was that the law[1] mandatorily required that a registrant claiming the IV-E type of classification be considered for this classification before being considered for the I-A-O type of classification.

The Court correctly instructed the jury on this point [R. p. 144] but, later on gave an instruction that concluded as follows:

---

[1] 32 C. F. R. §1623.2 Consideration of Classes.

1623.2 CONSIDERATION OF CLASSES.—Upon undertaking to classify any registrant, unless grounds are established to place the registrant in Class I-C under the provisions of section 1622.7 of this chapter, *the registrant shall be classified in the lowest class* for which he is determined to be eligible with Class I-A considered the highest class and Class V-A considered the lowest class according to the following table:

Class: I-A
I-A-O
IV-E
I-D
II-A
II-C
III-A
IV-A
IV-B
IV-C
IV-D
IV-F
V-A (Italics supplied)

[In effect until 28 September 1951 when designation I-O substituted for IV-E.]

"The facts as contained in the file may have been sufficient for the board to classify the defendant in IV-E, but if it felt under the facts that the defendant should be classified as I-A-O, it had the right to do that, and its decision is not subject to review by this Court" [R. p. 152].

Appellant submits that his cause was irreparably injured by the erroneous instruction that the board could classify him I-A-O even if the evidence before the board was sufficient for IV-E. The regulations made it mandatory for the board to consider the appellant for Class IV-E before considering him for Class I-A-O and mandatory that an IV-E be given if the facts before it were "sufficient," to use the Court's expression.

II.

A Defendant Is Prejudiced by a Closing Jury Argument of the United States Attorney So Improper That the Court of Appeals Itself Sees Fit to Condemn It.

The United States Attorney, in his closing speech said "if you come in with a verdict of not guilty I guarantee you no other draft board could come up here and tell you they haven't had but one. They will have nothing but pretended conscientious objectors . . . "

"MR. TIETZ: I ask that the jury be instructed to disregard that as going beyond the bounds of fair argument.

"THE COURT: Well, the jury is supposed to have good common sense and they can exercise it" [R. p. 135].

The trial court should have stopped the United States Attorney without waiting for defense counsel's objection; it was so held in the *Vierick* case where a similar argument was ruled improper.

Vierick v. United States, 318 U. S. 236, 247-248.

Also see:

August v. United States, 257 Fed. 388, 391, 394;
Hale v. United States, 25 F. 2d 430, 439.

An argument that failure to convict would impair efficiency of government agents was held reversible error, though objection was sustained.

Robinson v. United States, 32 F. 2d 505, 510.

The Court of Appeals, in its opinion stated "while we disapprove of argument of that character to a jury, we do not think Head was prejudiced thereby."

It is submitted that the jury should have been instructed to totally disregard this argument; that the trial court's remark was in effect an instruction they were to give the United States Attorney's argument the weight *they* believed it to be worth.

III.

A Defendant May Not Be Precluded by the Trial Court From Presenting Evidence That He Was Classified in Class I-A-O for Illegal Reasons Nor May He Be Precluded From Presenting Evidence That He Was Classified in Class I-A-O Without Any Basis of Fact.

During the trial appellant attempted to show the local board classified him in Class I-A-O:

1. Without any basis of fact, and
2. Because of extraneous reasons [that the registrants in Class I-O *at the time he was classified* had no obligation to do any work of National importance.]

Appellant subpoenaed the local board members and attempted to bring out from them additional facts to support the above conclusions, particularly the second, the first finding support in the selective service file [Exhibits 1-6].

Appellant was prevented from presenting such evidence, as follows:

> [R. p. 63]: "Q. The conscientious objector of the IV-E type had what responsibility if he was classified a conscientious objector, classification IV-E?"

Again:

> [R. p. 75]: "Q. (By Mr. Tietz): Will you please look at the file and pick out from the file,

taking as much time as you believe necessary, what the evidence was that led you to that conclusion?"

Again:

[R. p. 76]: "Q. Any evidence whereby you could fix a I-A-O classification on?"

Again:

[R. p. 99]: "Mr. Tietz: I want to find out, if that was discussed. I don't know. Maybe it was discussed.

The Court: Well, we will go to something else. It is not proper examination."

Again:

[R. p. 111]: "Mr. Tietz: It is more than a matter of feeling. It is a matter of their invariable practice that I believe I can bring out from this witness."

Also see pages 80, 81, 83 and 100.

The Court should have permitted appellant to present testimony that a basis other than a legal [evidentiary] one was used by the Selective Service System in classifying appellant.

Niznik v. United States, 184 F. 2d 972;
Niznik v. United States, 173 F. 2d 328;
United States v. Stiles, 169 F. 2d 445;
United States v. Zieber, 161 F. 2d 90;
United States ex rel. Phillips v. Downer, 135 F. 2d 521.

IV.

A Defendant Is Prejudiced When the Court of Appeals (Attempting to Cure the Failure of the Trial Court in Not Making a Necessary Finding) Finds That There Was a Basis of Fact for the I-A-O Classification and Supports Its Finding by a Line of Reasoning That Is Self-Contradictory.

The opinion of the Court of Appeals finds that a "basis of fact" existed for the classification of appellant in Class I-A-O.

1. The opinion recites "He did not sign Series XIV, Concientious Objection to War, in his classification Questionnaire." The opinion also states "On November 10, 1950, Head, for the first time, requested the special form for a conscientious objector."

   Appellant submits these two facts go to a different problem, to-wit: his sincerity. It is appellant's contention that neither the Selective Service System nor the courts may credit the truthfulness and sincerity of a registrant as a conscientious objector and at the same time discount it; that when the Selective Service System classifies him in Class I-A-O it certifies him to be a genuine conscientious objector; that it cannot draw a line for his scruples that neither he nor his evidence discloses; that it perhaps had the right to brand him a sham, because of the above two facts, but that if it does not do so it cannot thereafter deny him his claimed classifi-

cation if all the facts support his claim and none contradict it.

2. The opinion of the Court of Appeals puts two facts together to further support its conclusion that a "basis of fact" existed, namely: Head, in his Special Form for Conscientious Objectors (SSS Form No. 150), to quote the opinion, "asserted his religious beliefs were based upon the teachings of the Church of Christ at Waterford, and that the source of such teachings was the minister of that church, and that he relied for religious guidance upon such minister." The second fact being that when the F. B. I. interviewed the Waterford Minister, T. F. Thomasson, he, in the words of the opinion "stated that the teaching of the church at Waterford was that a person should not engage in carnal warfare, which meant the bearing of arms in time of war and that killing of other people, but that such church did not teach it was wrong to engage in non-combatant military duties and that 'the church had no objection to a member' engaging in non-combatant work."

The F. B. I. report was not in existence until many months after the local board gave appellant the I-A-O Classification. It is obvious therefore, that the F. B. I.-discovered fact (which will later be shown to be neither a fact nor of any probative value) was never before the local board. Its classification, consequently, was undisputedly without a basis of fact.

Appellant contends a registrant claiming a IV-E (now termed I-O) classification may not be given a I-A-O Classification unless there is definite evidence in the file on which to base the I-A-O Classification. Two District Courts have already explicitly so declared.

On June 25, 1952, Judge Murray, District of Montana, in an, as yet, unreported decision held:

> "Thereupon, after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reasons that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class I-A-O, and therefore the said Board was without jurisdiction to make such classification of defendant and to order defendant to report for induction under such classification."
>
> *United States v. Goddard,* ..... F. Supp. .....

On March 18, 1952, Judge McNamee, Northern District of Ohio in another, as yet, unreported decision held:

> "I think it would have been more difficult for the court to find the act of the board was without any basis in fact if the board has classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on religious grounds as being truthful, but they attempted, and in my opinion without any basis in fact, to assert that while he

was sincere and conscientious, that sincerity and conscientiousness extended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war and participation in war in all its forms."

United States v. Relyea, ... F. Supp. .....

V.

The Court of Appeals May Not Use Hearsay to Support Its Opinion That a Basis of Fact Existed for the Classification, Nor Could the Selective Service System Have Done So.

The F. B. I.-discovered fact, namely, the nature of T. F. Thomasson's pacifist beliefs is of no probative value.

The Selective Service Regulations do not afford a registrant an opportunity to see the investigation reports of the F. B. I. Appellant never had the opportunity or right to confront or cross-examine the "sources" of the reports. The Attorney General's instruction to his Hearing Officers is that they disclose to the registrants the "general nature" of any adverse information. This does not cure the hearsay taint.

On October 7, 1952, Judge Hincks, District of Connecticut, in an, as yet, unreported decision condemned this type of evidence:

"Congress was not using empty words when in Sec. 451 of the act it solemnly declared 'that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.' A system in which selections might be made in uninformed reliance upon the recommendation of an executive officer bottomed perhaps on secret police reports, would indeed make a mockery of that high declaration of policy. Only if the Act be construed to require that the investigative reports shall become a part of the record open to the appeal board and all concerned is the 'system of selection . . . just and fair' within our Anglo-Saxon concepts of justice and due process."

United States v. Geyer, ... F. Supp. .....

On November 10, 1952 the Court of Appeals, Second Circuit in an, as yet, unreported decision specifically approved the reasoning of the *Geyer* decision, *supra,* and quoted extensively from it.

In reversing a conviction the Second Circuit commented ". . . we think it was essential that the F. B. I. report, which results from that inquiry, should have been disclosed to the defendant. . . ."

Circuit Judge Frank said:

"At the hearing held by the hearing officer, he did not mention the F. B. I. investigative report;

nor did he give a summary of its contents or reveal the names of the persons who supplied the data described in the report." . . .

"To be sure, the defendant did not make a request, . . ."

"But even if defendant had made the request, the divulged information would not have afforded him adequate opportunity 'to prepare to answer and refute at the hearing such unfavorable evidence.' For that information would not have disclosed the identity of the witnesses who gave such 'evidence', and thus would not have put defendant in position to interrogate or impeach those witnesses.

"Accordingly, we think the hearing before the hearing officer violated the statute, for the reasons admirably stated by Judge Hincks in *United States v. Geyer,* ..... F. Supp. ....."

Nugent v. United States, ... F. 2nd .....

This Court found the classification action of the Attorney General arbitrary in *Joint Anti-Fascist Ref. Comm. v. McGrath,* 71 S. Ct. 624. The arbitrariness was chiefly due to the hearsay nature of the complained-of evidence as well as the ex parte conduct involved.

One of the reasons given by the Second Circuit, in *United States v. Remington,* 191 F. 2nd 246, reversing a perjury conviction, was the purely hearsay nature of the list of organizations referred to during the defendant's cross examination, the Joint Anti-Fascist case being cited as support.

Appellant submits the dictum of Chief Justice Hughes, in the *Consolidated Edison* case should apply:

> "Mere uncorroborated hearsay or rumor does not constitute substantial evidence."
>
> 305 U. S. 197, 230.

VI.

The Hearsay Evidence Upon Which the Court of Appeals Predicated Its Decision was Untrue; the Appellant Never Before Having Faced the Necessity of Showing the Truth on the Point Involved Should Have an Opportunity to Do So.

The only "fact" the Court of Appeals could find in the file that gave support to the I-A-O Classification was the F. B. I. report that T. F. Thomasson had stated ". . . but that such church did not teach it was wrong to engage in non-combatant military duties and that the church had no objection to a member engaging in non-combatant work."

When apprised he had been so quoted, T. F. Thomasson made an affidavit that shows he was misquoted, the most pertinent part being:

> "I read a letter from Brother Nelson Nichols in which it was stated that the F. B. I. man, who investigated Brother Ted Head, said that I said the Church of Christ, here where I worship, did not oppose taking part in non-combative service in carnal war. That certainly is a mistake. He

asked me whether I would be willing to minister the sick and wounded in hospitals. I told him I would, but I did not mean that I would join the army to do so; and that is the mistake."

The entire affidavit is set forth in Appendix B as are other affidavits of ministers of the same division of the Church of Christ.

VII.

A Selective Service Registrant, Professing to Be a Conscientious Objector to All Participation in Warfare, Is Not Bound by All the Views on the Subject Held by His Spiritual Teacher, Even Granting That Their Views Actually Differ.

Granting but not conceding that it is a fact T. F. Thomasson holds and teaches the "I-A-O" type of belief, even so, the appellant is not bound by this fact.

1. A pupil is not required to accept all the beliefs of his instructor, he may develop his own.

   For example: it is wrong to conclude a Catholic may not be a genuine conscientious objector because his church does not teach pacifism. In fact, the Selective Service System itself did not uniformly so rule, for during W W II, 162 Catholics were certified by local boards as genuine conscientious objectors and were sent to the Civilian Public Service Camps,[1] said Camps being established for regis-

[1]Special Monograph No. 11, Volume 1 (364 pages) "Conscientious Objection" published by the Selective Service System, 1950; pages 318-320.

trants found to be conscientiously opposed to any manner of participation in military activity.

2. A selective service registrant is to be judged by his own views, not necessarily by those held, or thought to be held, by a group from which he comes. Like guilt, conscience is personal. To judge a registrant by any other standard is wrong. The lower courts have already in different jurisdictions, accepted this philosophy as the law.

Recently, a District Court struck down the action of a Department of Justice Hearing Officer (and the Selective Service Appeal Board classification action based on it) because it was predicated on the assumption a conscientious objector could not originate from a Catholic background.

United States v. Everngam 102 F. Supp. 128.

also see:

Niznik v. United States, 173 F. 2d 328.

5. Conclusion.

It is submitted this Petition for Writ of Certiorari should be granted so as to correct the assigned errors committed against petitioner.

Respectfully submitted,

J. B. TIETZ,
Counsel for Petitioner.